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WILLOW V MTD: A SUCCESSFUL PART 8 CHALLENGE AFTER HUTTON V WILSON

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SUMMARY

Following Hutton v Wilson, Part 8 challenges to adjudication have become less common. However, in Willow v MTD, the TCC has made a declaration setting aside part of an adjudicator's decision where the adjudicator erred in his construction of a contract clause.

Bryan Cave Leighton Paisner acts for Willow in a dispute with MTD in relation to its role as main contractor in the design and construction of the Nobu Hotel, Shoreditch. Over the last 18 months the parties have been involved in a series of adjudications and court hearings, including a Part 7 claim by MTD and a Part 8 claim by Willow.

Last month, judgment was handed down by Pepperall J in relation to MTD's Part 7 claim and Willow's Part 8 claim, which were heard at the same time. I think the judgment raises at least two interesting issues:

- The circumstances in which a defendant to the enforcement of an adjudicator's decision can bring a Part 8 claim that is heard at the same time as the enforcement, in accordance with the principles in *Hutton Construction Ltd v Wilson Properties (London) Ltd*.
- Where the court rules that part of the adjudicator's decision is incorrect and cannot be enforced, the circumstances in which it will sever the decision.

Background to the dispute

The time for completion overran significantly, and the parties entered into a side agreement (June Agreement) to try to retain an opening date for the hotel of June 2017. The June Agreement included an extension of time to 28 July 2017, settlement of existing claims and an additional incentive payment to MTD.

Practical completion was finally certified in October 2017. MTD claimed an additional £2 million as part of its final account. Willow disagreed, serving a pay less notice in which it maintained that there were still significant defects and that it was entitled to levy £715,000 of liquidated damages due to the delay in the project reaching practical completion.

The adjudication

In November 2018, MTD commenced an adjudication seeking payment as set out in its final application for payment. Matt Molloy was appointed as the adjudicator.

In relation to Willow's entitlement to levy liquidated damages, the two parties contended for different interpretations of the June Agreement, and the adjudicator was required to construe its terms.

He relied on a schedule entitled "*Schedule of Dates for the Completion of the Hotel leading to PC*" that was appended to the June Agreement. Section 5 of the Schedule provided that:

> "*The proposal is for PC to be achieved by the 28.07.17 with an agreed attached lest [sic] of outstanding work and any final snagging testing and commissioning to be completed by the 22.09.17.*"

The adjudicator decided that the effect of that paragraph was to amend the contractual definition of practical completion and oblige the contract administrator to certify practical completion on 28 July 2017, irrespective of the state of works.

Proper construction of the June Agreement

Many people thought that the judgment of Coulson J (as he then was) in *Hutton v Wilson* would curtail the use of Part 8 claims to resist enforcement of an adjudicator's decision.

Notwithstanding that, Willow issued a Part 8 claim on 28 December 2018 seeking a number of declarations from the court, including declarations as to the true construction of the June Agreement. Willow submitted that it was clear that the adjudicator had made an error: the effect of section 5 of the June Agreement could not be to deem practical completion as that would render all other provisions otiose. It would mean that, in effect, there was no incentive for MTD to complete the outstanding work and remedy the existing defects before 28 July 2017, as practical completion would be deemed to have been achieved on that date, despite the existence of thousands of defects of which both parties were aware at the time they entered into the June Agreement.

In our view, Willow's Part 8 claim was clearly based on the principles espoused in *Hutton v Wilson*. It sought the court's declarations upon an issue that in its submission:

- Was short and self-contained.

- Did not require any further evidence beyond that required at an interlocutory summary judgment hearing.
- Would be unconscionable to ignore on summary judgment.

On 7 January 2019, MTD issued a Part 7 claim seeking enforcement of the adjudicator's decision.

Willow sought to use its Part 8 claim as a defence to MTD's Part 7 claim for enforcement. It applied for its Part 8 claim to be heard at the same time as MTD's enforcement application. The TCC agreed, and the combined cases were heard by Pepperall J over the course of a day and a half.

In finding in Willow's favour on its Part 8 claim, Pepperall J made a number of observations:

- Willow had complied with *Hutton v Wilson* as it "took the proactive step of issuing its Part 8 claim without waiting for MTD to launch enforcement proceedings".
- The construction issue was "short and self-contained and well-suited to being determined in Part 8 proceedings".
- "The adjudicator erred in his construction of the June Agreement".

The fact that the adjudicator simply got it wrong was sufficient in the judge's view for the part of his decision dealing with liquidated damages to be set aside. This is the first case of which I am aware where an adjudicator's decision (or part of one) has been set aside in accordance with the principles in *Hutton v Wilson* relating to the adjudicator's interpretation of a contractual provision.

So clearly the TCC is willing to intervene where a party acts swiftly on a true point of contractual interpretation that is obviously incorrect.

Severability

Having decided that the adjudicator had erred on the point of contractual interpretation, the court then considered the effect of that finding on the rest of the decision as to defects.

At the hearing, counsel for both parties made submissions as to the effect of the court's finding that the adjudicator had erred in his construction of the June Agreement. Due to the paucity of cases in which *Hutton v Wilson* has successfully been applied, there was no authority dealing with the precise situation that was before the court.

Willow relied on a line of authority in which the court refused to sever a decision in circumstances where a breach of natural justice had been established by the challenging party. In Cantillon Ltd v Urvasco Ltd, Akenhead J stated, obiter, that:

> *"… in all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will*

not be enforced by the Court."

Willow argued that only one dispute had been referred to adjudication (MTD's entitlement to payment) and, as in *Cantillon,* the adjudicator's erroneous findings in relation to liquidated damages could not be severed from the balance.

Pepperall J held that:

> *"The proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed."*

Pepperall J's judgment was that the good could be severed from the bad: the remainder of the adjudicator's decision could safely be enforced, as it was distinct from the adjudicator's findings as to defects.

The logic of that position is that, in circumstances where the adjudicator has got something wrong, the balance is often not tainted by that erroneous finding. This is in clear contrast to an adjudicator's decision that is subject to a significant procedural irregularity or other breach of natural justice.

Conclusion

The decision provides helpful practical guidance to parties considering issuing a Part 8 challenge to an adjudicator's decision: it is essential to commence a Part 8 claim swiftly. It also provides welcome clarity around severability of decisions, which will assist parties who are considering the consequences of a limited challenge.

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